

Message Text

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TO AMEMBASSY VIENNA IMMEDIATE

AMEMBASSY PARIS PRIORITY

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VIENNA FOR UNIDO

E.O. 11652: GDS

TAGS:EGEN, UNIDO

SUBJECT: DRAFT DECLARATION AND PLAN OF ACTION ON INDUS-
TRIAL DEVELOPMENT AND COOPERATION: NATIONALIZATION ISSUES

REF: STATE 037567

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1. DEPT'S COMPREHENSIVE COMMENTS ON GROUP B DRAFTING COMMITTEE'S REDRAFT OF GROUP OF 77 DECLARATION AND PLAN OF ACTION ON INDUSTRIAL DEVELOPMENT AND COOPERATION FOLLOWS SEPTEL. THIS MESSAGE SOLELY ADDRESSES OPERATIVE PARA. 8 OF THE GROUP B DRAFTING COMMITTEE'S REDRAFT.

2. UNIDO MISSION SHOULD INFORM GROUP B MEMBERS THAT THE DRAFTING COMMITTEE'S REDRAFT OF PARA. 8 IS UNACCEPTABLE ON MULTIPLE POINTS. IT SO SUBSTANTIALLY CONFLICTS WITH THE POLICIES OF THE USG AND OTHER WESTERN INDUSTRIALIZED STATES, AS MOST RECENTLY MANIFESTED IN THE VOTES OF MANY OF THEM AGAINST ARTICLE 2 OF CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES, AND SIX OF THEM AGAINST CERDS AS A WHOLE (AS WELL AS TEN ABSTENTIONS), THAT, WERE SUCH LANGUAGE TO BE PROPOSED IN THIS CONTEXT, USG WOULD FEEL OBLIGED TO MAINTAIN ITS NEGATIVE VOTE.

3. DEFECTS OF THE COMMITTEE'S REDRAFT INCLUDE THE FOLLOWING:

- (A) IT SPEAKS OF AN INALIENABLE RIGHT "FULLY AND FREELY" OF A STATE TO EXERCISE SOVEREIGNTY OVER NATURAL RESOURCES, AND TO EXPLOIT THEM "IN ANY MANNER APPROPRIATE TO ITS CIRCUMSTANCES", PROVISIONS WHICH ARE OBJECTIONABLE BECAUSE THEY MAY BE READ AS MEANING THAT A STATE CAN DEAL WITH ITS NATURAL RESOURCES WITHOUT REGARD TO OBLIGATIONS IT MAY HAVE UNDER INTERNATIONAL LAW IN RESPECT OF PERTINENT RIGHTS OF FOREIGN INVESTORS.

- (B) THE UNACCEPTABILITY OF THE FOREGOING PROVISIONS IS CONFIRMED BY THE FAR MORE DAMAGING STATEMENT THAT THIS RIGHT INCLUDES "NATIONALIZATION AS AN EXPRESSION OF THIS RIGHT" WHICH IS TO BE "IN ACCORDANCE WITH THE NATIONAL LAWS IN FORCE IN THE COUNTRY EXERCISING THIS RIGHT". THESE PROVISIONS SQUARELY CONFLICT WITH THE USG POSITION, GENERALLY SHARED IN GROUP B, THAT THE LAWFULNESS OF NATIONALIZATION, INsofar AS FOREIGN RIGHTS ARE AFFECTED, IS GOVERNED ULTIMATELY BY INTERNATIONAL, NOT NATIONAL LAW. (THEY ALSO CONFLICT WITH UNGA RES. 1803 (XVII), ON PERMANENT SOVEREIGNTY.)
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- (C) THE QUALIFICATION OF THIS LATTER STATEMENT -- TO ADD TO NATIONAL LAW "RELEVANT NORMS RECOGNIZED BY ALL COUNTRIES, IN THE ABSENCE OF AGREEMENTS TO THE CONTRARY"--MAKES THIS SUGGESTION OF THE DRAFTING COMMITTEE WORSE STILL. RATHER THAN PROVIDING FOR THE APPLICABILITY OF INTERNATIONAL LAW, THE INADEQUATE TERM "RELEVANT NORMS" IS SUBSTITUTED. MOREOVER, SUCH NORMS MUST BE

RECOGNIZED BY "ALL COUNTRIES". YET, IT IS NOTORIOUS THAT THE COMMUNIST STATES AND SOME OTHERS PRACTICALLY AND OFFICIALLY REPUDIATE RATHER THAN OBSERVE THESE NORMS OF CUSTOMARY INTERNATIONAL LAW; THE EFFECT, ACCORDING TO THIS TEXT, IS TO RENDER THESE NORMS INAPPLICABLE. IT IS DIFFICULT TO SEE HOW THE INTERESTS OF THE INDUSTRIALIZED DEMOCRACIES COULD BE ADVANCED BY SUCH A PROPOSAL.

- (D) MOREOVER, THE FOREGOING SHALL GOVERN "IN THE ABSENCE OF AGREEMENTS TO THE CONTRARY". MEANING OF THIS NOT CLEAR. HOWEVER IT IS OPEN TO UNFORTUNATE INTERPRETATION THAT, IF THE FOREGOING SWEEPING NATIONAL RIGHTS ARE TO BE RESTRICTED, AND IF INTERNATIONAL LAW IS TO BE APPLIED, THE BURDEN RESTS UPON THOSE WHO WOULD DO SO OF EXTRACTING AGREEMENT SO STATING FROM HOST STATES.

- (E) THE TEXT FURTHER PROVIDES THAT NO STATE SHALL BE SUBJECTED TO ANY FORM OF COERCION WHICH IMPEDES THE FULL EXERCISE OF PERMANENT SOVEREIGNTY. THIS AGAIN, AS CERDS DEMONSTRATES, IS A PROVISIO UNACCEPTABLE TO THE USG AND OTHER WESTERN STATES IN THIS SPECIFIC CONTEXT. IT CAN BE TAKEN AS CONDEMNING THE EXERCISE OF LAWFUL COERCION, E.G., WITHHOLDING OF AID PURSUANT TO THE HICKEN-LOOPER AMENDMENT OR PURSUIT OF "HOT PRODUCT" SUITS BY COMPANIES WHICH HAVE BEEN EXPROPRIATED CONTRARY TO INTERNATIONAL LAW. AS CERDS EXERCISE SHOWED, USG IS WILLING TO ACCEPT ONLY A GENERAL STATEMENT ON THE EXERCISE OF ECONOMIC COERCION NOT DIRECTED ONLY AT THE NATIONALIZATION CONTEXT, WHICH APPLIES AS MUCH TO ACTS OF DEVELOPING COUNTRIES AS TO THOSE OF DEVELOPED.

4. FOR PARIS: REQUEST EMBASSY TO DISCUSS FOREGOING WITH DE LACHARIERRE AND CHOLLET, RECALLING THAT FRANCE TOOK A LIMITED OFFICIAL USE

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POSITION ON THESE ISSUES IN CERDS DIRECTLY OPPOSED TO THE APPROACH WHICH IT APPEARS THAT THE FRENCH REPRESENTATIVE ON GROUP B UNIDO DRAFTING COMMITTEE IS SUPPORTING. KISSINGER

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